

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001

MODERN RULES OF PROCEDURE FOR THE  
ISSUANCE OF ADVISORY OPINIONS IN  
NATURE OF SERVICE PROCEEDINGS

Docket No. RM2012-4

**UNITED STATES POSTAL SERVICE INITIAL COMMENTS**

(June 18, 2012)

In Order No. 1309 (“Order”), the Commission issued an advance notice of proposed rulemaking “[s]oliciting comments on its current procedures under 39 U.S.C. § 3661 for reviewing proposals by the Postal Service to make changes in the nature of Postal Services.”<sup>1</sup> In pertinent part, the Order sets forth a “goal of increas[ing] efficiency and timely resolution of nature of service cases while protecting rights of all participants” and “welcomes comments on (1) whether changes to the current procedures and regulations are warranted; (2) if so, what those changes would be; and (3) such other relevant subjects as commenters may wish to address.”<sup>2</sup> This pleading presents the United States Postal Service’s (“Postal Service’s”) initial comments toward the Commission’s laudable goal.

While the Postal Service believes that this rulemaking will help the Commission identify procedural changes to its regulations that will improve the

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<sup>1</sup> Order No. 1309, Advance Notice of Proposed Rulemaking on Modern Rules of Procedure for Nature of Service Cases Under 39 U.S.C. 3661, PRC Docket No. RM2012-4 (April 10, 2012), at 1.

<sup>2</sup> *Id.* at 1-2.

efficiency and utility of proceedings under 39 U.S.C. § 3661<sup>3</sup>, it does not believe that regulatory changes alone are the best and most efficient solution to resolving the strains that have recently accompanied such cases. Instead, the Postal Service believes that the simplest, most certain, and therefore most meaningful course to improve N-cases' relevance and value is that approved by the current Senate, with its 90-day time limit on N-cases and its lifting of the applicability of formal hearing requirements under 5 U.S.C. §§ 556 and 557.<sup>4</sup> Thus, while the Postal Service hails the Commission's willingness to look for ways within its current powers to streamline N-cases, the Postal Service does not believe that this project should distract from the need for more fundamental legislative reform of N-case procedures.

## **I. Introduction**

In the Order, the Commission recognizes the challenging financial position in which the Postal Service currently finds itself and acknowledges the need for a more "expeditious" hearing process.<sup>5</sup> The Order goes on to identify the fact that the procedures for N-cases have not been updated in nearly 20 years and that the increasing number and complexity of such cases necessitates a re-examination of the Commission's "historic practice of conducting N-cases as trial-type proceedings, according participants extensive discovery and oral cross-

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<sup>3</sup> In these comments, 39 U.S.C. § 3661 will be referred to as "Section 3661" and proceedings thereunder as "N-cases," due to the manner in which the Commission designates them for docketing purposes.

<sup>4</sup> S. 1789, 112th Cong. § 208 (2012).

<sup>5</sup> Order No. 1309 at 3.

examination opportunities in all cases.”<sup>6</sup> Ultimately, the Order requests comments on the advisability of adopting procedures that would result in “more timely and relevant advisory opinions.”<sup>7</sup>

As the Postal Service continues to adapt to rapid market changes, the Commission may increasingly be called upon to offer its advice on the suitability of proposals to change various postal services. However, as the financial position of the Postal Service further deteriorates and the urgency of cost-reduction and efficiency-promotion efforts increases, the value and relevance of the Commission’s advice would depend largely on its timely receipt by Postal Service management. Postal Service decision-making is increasingly dynamic, with a need to balance multiple strategies and stakeholder interests, and it cannot easily be put on hold for months awaiting a Commission advisory opinion. In order to ensure that the advisory opinion process can play an effective role as the Postal Service responds to the challenges that it faces, the goal of this rulemaking should be to identify and implement procedural changes that ensure the issuance of an advisory opinion within a 90-day period.

The Administrative Procedure Act (APA) governs the way in which administrative agencies may establish regulations or conduct adjudications. In 5 U.S.C. §§ 556 and 557, Congress provided a list of procedural elements that must be included in proceedings known as “formal adjudications.” Though tradition has dictated that such adjudications take the form of “trial-like” hearings, including lengthy evidentiary hearings, courts have observed that “[t]he APA lays

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<sup>6</sup> *Id.* at 6.

<sup>7</sup> *Id.* at 3.

out only the most skeletal framework for conducting agency adjudications, leaving broad discretion to the affected agencies in formulating detailed procedural rules.”<sup>8</sup> Indeed, the Commission itself acknowledges that “[t]he authority of regulatory agencies like the Commission to revise their regulations to place limits on the use of formal litigation procedures in certain types of cases has been judicially recognized.”<sup>9</sup>

The APA does not impose a rigid structure for formal adjudications; it simply directs agencies to include certain procedural features. Consequently, as the Commission itself has acknowledged, the APA provides agencies with broad discretion to fashion procedures that make the hearing process more efficient.<sup>10</sup> The Commission’s own experience with N-cases provides ample foundation for exploring how such proceedings can be improved. Even the Supreme Court encouraged the exercise of this discretion when it stated that “administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.”<sup>11</sup>

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<sup>8</sup> *Citizens Awareness Network v. United States*, 391 F.3d 338, 349 (1st Cir. 2004) (citing *Am. Trucking Ass’ns, Inc. v. United States*, 627 F.2d 1313, 1321 (D.C. Cir. 1980)).

<sup>9</sup> Order No. 1309 at 6.

<sup>10</sup> Order No. 1309 at 7 (citing *Citizens Awareness Network*, 391 F.3d at 351 (“An agency’s rules, once adopted, are not frozen in place. The opposite is true: an agency may alter its rules in light of its accumulated experience in administering them.”)).

<sup>11</sup> *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 543-44 (1978). Constitutional due process would not require a hypothetical court to review any revised N-case procedures under the formal balancing test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), because N-cases result only in written advice to Postal Service decision-makers, not the deprivation of a protected liberty interest. However, even in *Mathews*, the Supreme Court applied the formal test to approve streamlined agency adjudication procedures.

As a result of certain procedural elements of N-cases, Section 3661 advisory opinions can be deferred to the point of undermining their intended purpose to advise Postal Service management in a dynamic decision-making environment. For instance, designated periods for formal party interventions – the first stage in an N-case – are longer than necessary in an age of Internet access to public information. Discovery has taken up to six months in recent N-cases. Multiple rounds of formal hearings and open field hearings for comments, in conjunction with allowances for hearing preparation time, further pad procedural schedules. All of these inject inefficiency into the Commission's process in a way that is doubly out of step with the advisory nature of the resulting opinion – both in the sense that a regulatory process leading to a non-binding opinion typically should not be more involved than regulatory processes with more direct effect, and in the sense that delay and distraction of purpose can interfere with the provision of timely advice to the Postal Service.

Section II of these comments outlines the way in which various procedural factors contribute to protraction of N-cases and offers recommendations for how the Commission might address each. The first set of recommendations build on one another, although they conceivably could work in the alternative if need be: the Commission should adopt a cap on the length of N-cases that applies to all such cases (Section II.A.1), and it should adopt a multi-track approach to proceedings, with definite, shorter timeframes based on the complexity of the case (Section II.A.2). Recommendations for reforming N-case discovery are presented in the alternative: if the Commission is disinclined toward the primary

proposal – using its discretion in many cases to replace party discovery with Commission-led information-gathering (Section II.B.1) – then Sections II.B.2 and II.B.3 offer alternative, albeit less effective, means to reduce the impact of party discovery on the timely submission of advisory opinions. Other recommendations are independent of one another, such as those about field hearings (Section II.C) and notices for intervention (Section II.D). Although the Postal Service believes that the most effective option for improving N-cases’ efficiency, consistency, and proportionality would come through legislative reform along the lines of the current Senate bill, the recommendations outlined herein could enable the Commission to streamline N-cases into more manageable boundaries on its own.

## **II. Contributing Procedural Factors and Potential Solutions**

### **A. Timeframes**

#### **1. Time Limit for Proceedings**

As the Commission acknowledges in Order No. 1309, efficiency and timely resolution of Section 3661 proceedings are essential, particularly in light of the 5-to-12-month periods that have marked past such proceedings.<sup>12</sup> Protracted N-case proceedings naturally delay issuance of the Commission’s opinion. This delay can, in turn, undercut the opinion’s function of providing timely expert advice to Postal Service management and, particularly given current cost-

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<sup>12</sup> Order No. 1309 at 1, 3. Of the five most recent N-cases, PRC Docket No. N2011-1 had the shortest period: 149 days (5 months). The longest was the pre-PAEA PRC Docket No. N2006-1, which took 359 days (12 months). The average length of an N-case was 267 days (approximately 9 months).

reduction pressures due to the Postal Service's unsustainable financial position, force the Postal Service to decide whether to make the operational changes without Commission advice.

Many federal agencies set abbreviated timeframes for their issuance of advisory opinions, ranging from 20 to 90 days.<sup>13</sup> Although at least some other agencies' advisory opinion processes may not be subject to 5 U.S.C. §§ 556 and 557,<sup>14</sup> unlike the Commission's Section 3661 proceedings, the interagency comparison underscores the point that proceedings ranging from five months to a year (or potentially more) are unusually drawn-out relative to the objective of a non-binding advisory opinion. When the complexity of a given proposal might reasonably demand additional time for consideration beyond a 90-day period, the Commission could provide that it and the Postal Service can jointly agree on an alternative schedule. The U.S. Senate agrees that the Commission's advisory opinion process can and should be subject to a 90-day time limit, except where the Commission and the Postal Service agree otherwise.<sup>15</sup>

The Commission's existing rules provide that the Postal Service must file a Section 3661 proposal at least 90 days in advance of the service change's effective date.<sup>16</sup> In the interest of certainty for the Postal Service, Congress,

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<sup>13</sup> *E.g.*, 11 C.F.R. § 112.4 (Federal Election Commission: 60 days, or 20 days in certain circumstances); 12 C.F.R. §§ 211.11(c)(2), 225.27(a)(2), 225.88(e)(2) (Federal Reserve Board of Governors: 45 days); 15 C.F.R. § 750.2(b) (Bureau of Industry and Security: 30 days); 31 C.F.R. § 30.16(a)(4) (Office of the Special Master for TARP Executive Compensation: 60 days); 42 C.F.R. §§ 411.379(b), .379(e), .380(c)(1) (Centers for Medicare and Medicaid Services: 90 days after formal acceptance); 42 C.F.R. §§ 1008.41(b), .41(e), .43(c)(1) (Office of the Inspector General for Health and Human Services: 60 days after formal acceptance).

<sup>14</sup> *E.g.*, 19 C.F.R. § 210.79(a) (International Trade Commission).

<sup>15</sup> S. 1789, 112th Cong. § 208 (2012).

<sup>16</sup> 39 C.F.R. § 3001.72.

mailers, and other interested parties, the Postal Service recommends that the Commission establish that 90 days is, in fact, the time limit for such proceedings, unless the Commission and the Postal Service agree otherwise in the context of a specific proceeding. The Commission operates under a 90-day timeframe with respect to no less complex matters involving similarly diverse and weighty public interests, such as the Annual Compliance Determination (39 U.S.C. § 3653(b)) and changes in market-dominant product prices due to exigent or extraordinary circumstances (39 U.S.C. § 3622(d)(1)(E)). In fact, these other 90-day proceedings lead to final, binding orders, and it makes little sense to have a process that is purely advisory take up to four times as long to complete.

To be sure, the imposition of a formal time limit, without more, might only establish a mark that proves difficult to hit. Additional changes to the Commission's Section 3661 procedures, such as those recommended in sections B and C below, would help ensure that such proceedings could be concluded within a 90-day timeframe.

## **2. Multi-Tier Schedules**

In the interest of greater structure and certainty for the timing of various types of N-cases, the Postal Service would recommend that the Commission establish clearer timeframes for the issuance of advisory opinions that account for the circumstances of each case. The Commission could refer to such factors as (1) a proposal's scope, in terms of general impact on Postal Service operations, (2) the population of mailers and other interests most likely to be affected, (3) the proportion of mail volume most likely to be affected, relative to

the overall mail network, and (4) the extent to which the subject matter has or has not been subject to past Commission consideration. For example, a Section 3661 proposal that would alter retail operations and retail service at a subset of locations around the country should not warrant the same extent of proceedings as a proposal that would affect all mail users and nationwide Postal Service operations.

If it adopts this approach, the Commission should establish in its regulations multiple procedural tiers into which it could slot Section 3661 cases upon weighing the relevant factors. Such tiers could be expressed as a matrix, using the factors described in the previous paragraph for illustrative purposes, that would provide a firm date for the issuance of an advisory opinion:

<b>Category</b>	<b>Factors</b>	<b>Procedural timeframe</b>
Low	<ul style="list-style-type: none"><li>• Low impact on Postal Service operations</li><li>• Relatively narrow range of affected parties</li><li>• Relatively small proportion of mail volume</li><li>• Builds on changes or other matters previously before the Commission</li><li>• Particular basis for expedition</li></ul>	45 days
Moderate	<ul style="list-style-type: none"><li>• Medium impact levels or combination of low and high factors</li></ul>	60 days
High	<ul style="list-style-type: none"><li>• Large impact on Postal Service operations</li><li>• Relatively wide range of affected parties</li><li>• Relatively large proportion of mail volume</li><li>• Largely new issues for Commission consideration</li><li>• No indication of need for expedition</li></ul>	90 days

The Nuclear Regulatory Commission's (NRC's) multi-tier approach to nuclear reactor licensing proceedings illustrates the opportunities available under the APA.<sup>17</sup> Since 2004, the NRC has utilized a streamlined track for such proceedings. The NRC preserved its original set of hearing procedures, which resembled federal civil trials, as well as N-cases,<sup>18</sup> with their full panoply of traditional discovery devices and the direct and cross-examination of witnesses by advocates for each party.<sup>19</sup> These more formal proceedings can still be used if the hearing officer finds that a "contested matter necessitates resolution of issues of material fact."<sup>20</sup> By contrast, the streamlined hearing procedures are aimed at providing fair but expeditious adjudications.<sup>21</sup> traditional discovery is replaced with mandatory disclosures, the interrogation of witnesses is undertaken by the hearing officer, and cross-examination is not available by right, unless the hearing officer deems it necessary to "ensure the development of an adequate record for decision."<sup>22</sup> The U.S. Court of Appeals for the First Circuit upheld the NRC's new procedures under 5 U.S.C. §§ 556 and 557, concluding that

the [NRC's] judgments as to when its procedures need fine-tuning and how they should be retooled are ones to which we accord great

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<sup>17</sup> Although the NRC's governing statutes do not expressly require formal adjudications, the agency has interpreted the pertinent provisions as requiring formal adjudications under the APA. In the case discussed below, the U.S. Court of Appeals for the First Circuit accepted this interpretation and went on to conclude that the new rules were consistent with 5 U.S.C. §§ 556 and 557. *Citizens Awareness Network v. United States*, 391 F.3d 338, 351 (1st Cir. 2004).

<sup>18</sup> Compare 39 C.F.R. Part 3001 with 10 C.F.R. Part 2, Subpart G.

<sup>19</sup> 10 C.F.R. §§ 2.705, .710, .711. Traditionally, these hearings have proven to be very lengthy, with some lasting as long as seven years. *Citizens Awareness Network*, 391 F.3d at 343.

<sup>20</sup> 10 C.F.R. § 2.310.

<sup>21</sup> *Citizens Awareness Network*, 391 F.3d at 344.

<sup>22</sup> 10 C.F.R. §§ 2.366, .1204, .1207.

respect. We cannot say that the [NRC's] desire for more expeditious adjudications is unreasonable, nor can we say that the changes embodied in the new rules are an eccentric or a plainly inadequate means for achieving the [NRC's] goals.<sup>23</sup>

By upholding the NRC's procedural changes, the court essentially allowed the agency to establish a tiered hearing structure whereby most reactor licensing applications utilize the streamlined procedures, while more challenging license applications may continue using the older, more formal adjudicatory procedures. For various reactor licensing and other contexts, the NRC has adopted additional sets of "hearing tracks" that vary in their level of procedural formality.<sup>24</sup> These tracks vary from full "trial-like" proceedings to informal hearings based on the review of written filings. The result is a comprehensive palette of procedural tools for cases of varying levels of complexity.<sup>25</sup>

The Commission could likewise adopt a multi-track approach to N-cases, with different levels of procedural rigor applicable to matters of varying complexity. Clear thresholds in the Commission's new rules would allow the Postal Service to determine easily into which tier its Request for an Advisory Opinion should fit, based on application of the relevant factors. The Postal Service would then specify the applicable tier in its Request, and the N-case would proceed accordingly.

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<sup>23</sup> *Citizens Awareness Network*, 391 F.3d at 355.

<sup>24</sup> See 10 C.F.R. Part 2, Subparts J, K, M, N.

<sup>25</sup> A chart summarizing the NRC's various hearing tracks is available at [www.nrc.gov/about-nrc/regulatory/adjudicatory/hearing-track-selection.html](http://www.nrc.gov/about-nrc/regulatory/adjudicatory/hearing-track-selection.html).

## **B. Discovery**

### **1. Commission-Led Information-Gathering**

Current Commission practice allows for parties to propound discovery on the Postal Service and, to a less-enlisted extent, on other parties in all Section 3661 cases. The result is months of inquiries, production requests, and motions practice that must play out before the Commission, on top of the oral hearings with their opportunity for evidentiary presentation and cross-examination. The cumulative complexity of these discovery requests and their unipolar focus on the Postal Service inevitably add a measure of procedural delay that is, in turn, out of proportion to the ultimate object of a non-binding advisory opinion.

N-case participants primarily conduct discovery through written interrogatories and requests for the production of documents.<sup>26</sup> Unlike *inter partes* civil discovery in the courts, discovery in Commission proceedings works through the Presiding Officer and operates as written cross-examination. Also unlike even the most complex civil discovery, no limit applies to the number of interrogatories or requests for production that may be submitted by participants, provided that the interrogatories or requests seek “nonprivileged information” that is “relevant to the subject matter in such proceeding.”<sup>27</sup> With respect to discovery requests that seek Postal Service documents or data, the Postal Service must locate, review, and produce any responsive, non-privileged records that are in its

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<sup>26</sup> 39 C.F.R. §§ 3001.26, .27.

<sup>27</sup> 39 C.F.R. § 3001.25. *But see* FED. R. CIV. P. 33(a)(1) (imposing limit of 25 interrogatories, including all discrete subparts, subject to proponent’s ability to seek court permission for additional interrogatories).

“custody or control”<sup>28</sup>, including records that may be located in Postal Service, United States Postal Inspection Service, and United States Postal Service Office of the Inspector General field offices throughout the country. Because all discovery responses have the strong potential to become part of the evidentiary record that the Commission will ultimately be required to review as it prepares its advisory opinion, liberal discovery rules and their liberal application contribute significantly to the Commission’s and other stakeholders’ workload in N-cases.<sup>29</sup>

In the past five completed N-cases, the average length of time afforded to the conduct of initial discovery on the Postal Service’s direct case was 76 days, or approximately two and a half months.<sup>30</sup> Additionally, follow-up interrogatories to clarify or elaborate on earlier responses may be filed after the initial discovery period ends, provided they are filed within seven days of receipt of the answer to the previous request.<sup>31</sup> Lengthy discovery periods contribute to the overall length of time to resolve N-case proceedings, thereby postponing the issuance of an advisory opinion.

The Commission’s discovery procedures are inconsistent with modern practice, which recognizes the need for rational limits on discovery. The Commission’s rules broadly permit “discovery reasonably calculated to lead to

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<sup>28</sup> 39 C.F.R. § 3001.27.

<sup>29</sup> The Commission’s rules permit a participant to object to a discovery request within 10 days of the filing of the request, thereby delegating to the participants the responsibilities of (1) enforcing the requirement that discovery requests be relevant to the subject matter of a proceeding and (2) ensuring that a request does not pose an unreasonable burden on a participant. 39 C.F.R. §§ 3001.26(c), .27(c). However, even these rules contribute to the Commission’s workload because such objections often lead to protracted motions practice in which parties submit pleadings in opposition to, or in support of, an objection. The Commission’s Presiding Officer and, in some cases, the full Commission, must then review these pleadings and issue a ruling on the request.

<sup>30</sup> Time periods ranged from 34 days to 122 days.

<sup>31</sup> 39 C.F.R. § 3001.26.

admissible evidence during a noticed proceeding.”<sup>32</sup> The Commission has not updated its rules or practice to reflect the principle of proportionality (that is, that discovery should be appropriate to the size and stakes of the proceeding).<sup>33</sup> Nor has it recognized that discovery need not and, in today’s world of electronic information, should not reach to every document that meets the technical definition of relevance. As mentioned above, there are no limits today on the amount of discovery that can be propounded in Commission proceedings, as there are in the civil judicial context.

Alternatives to these discovery practices, based on practices found in other Commission proceedings, would encourage more procedural efficiency and fewer distractions. Indeed, Commission practice in virtually all other types of proceedings suggests a ready option: fact-finding through Commission-issued information requests, with the option to parties of submitting proposed

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<sup>32</sup> 39 C.F.R. § 3001.25.

<sup>33</sup> See, e.g., *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 358 (D.Md. 2008) (“[Federal Rule of Civil Procedure 26(g)] aspires to eliminate one of the most prevalent of all discovery abuses: kneejerk discovery requests served without consideration of cost or burden to the responding party. Despite the requirements of the rule, however, the reality appears to be that with respect to certain discovery, principally interrogatories and document production requests, lawyers customarily serve requests that are far broader, more redundant and burdensome than necessary to obtain sufficient facts to enable them to resolve the case through motion, settlement or trial. The rationalization for this behavior is that the party propounding Rule 33 and 34 discovery does not know enough information to more narrowly tailor them, but this would not be so if lawyers approached discovery responsibly, as the rule mandates, and met and conferred before initiating discovery, and simply discussed what the amount in controversy is, and how much, what type, and in what sequence, discovery should be conducted so that its cost—to all parties—is proportional to what is at stake in the litigation. The requirement of discovery being proportional to what is at issue is clearly stated at Rule 26(g)(1)(B)(iii) (lawyer’s signature on a discovery request certifies that it is ‘neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action’), as well as Rule 26(b)(2)(C)(i)-(iii) (court, on motion or on its own, must limit the scope of discovery if the discovery sought is unreasonably cumulative or duplicative, can be obtained from a more convenient source, could have been previously obtained by the party seeking the discovery or the burden or expense of the proposed discovery outweighs its likely benefit).”); see also Sedona Conference Commentary on Proportionality in Electronic Discovery (2010), available at [www.thesedonaconference.org/download-pub/469](http://www.thesedonaconference.org/download-pub/469).

information requests to the Commission. As discussed in section II.A.2 above, the U.S. Court of Appeals for the First Circuit upheld streamlined NRC procedures that included just such a technique – circumscribing party discovery in favor of information-gathering by a presiding officer – as consistent with 5 U.S.C. §§ 556 and 557.<sup>34</sup>

The Commission's most complex task is arguably the comprehensive survey of postal finances and operations that yields the Annual Compliance Determination (ACD). Yet the Commission has proven entirely capable of reviewing the Postal Service's submissions, allowing full and fair briefing of any party issues, and producing a thorough review of the Postal Service's compliance with statutory policies – all while cleaving to a 90-day schedule. A notable difference between the efficient ACD process and the process for Section 3661 requests is that, in the former, interested parties may not engage in freewheeling discovery to serve their own ends. Rather, the Commission itself submits information requests to the Postal Service; while parties may submit proposed questions to the Commission, the Postal Service can focus its resources on only those questions that the Commission itself sees fit to pose. Commission selection of questions eliminates the prospect of duplicative questions – in the

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<sup>34</sup> *Citizens Awareness Network v. United States*, 391 F.3d 338, 350-54 (1st Cir. 2004). This approach would also appear closer to the level of process that other federal agencies afford to advisory opinion requests. For example, the Federal Election Commission provides only that parties may submit written comments on an advisory opinion request, 11 C.F.R. § 112.3, not that parties may propound discovery or cross-examination on the requester. Likewise the Office of Government Ethics, *e.g.*, 5 C.F.R. § 2638.307, and the Food and Drug Administration. 21 C.F.R. § 10.85. Other agencies, such as the Federal Reserve, the Federal Trade Commission, and the Federal Transit Administration, do not even provide for third-party comment, but do provide that the agency may seek additional information from the requester. *E.g.*, 12 C.F.R. §§ 112.11(c)(1), 225.88(e)(1)(iii); 16 C.F.R. § 1.2(a); 49 C.F.R. § 604.18(c). As with the interagency comparison in the previous section, this comparison underscores the point that a mere non-binding advisory opinion should not demand exceptional, let alone unbounded, adversarial procedures.

sense of the same question either posed by multiple parties or by the same party to multiple witnesses, as have been seen in recent cases such as PRC Docket No. N2012-1 – which consume unnecessary time and effort.

There is no indication that the exclusive use of Commission information requests somehow impoverishes the quality of the Commission's ACDs or of its determinations in other types of proceedings that use the same technique, including the Commission's rulings on market tests, product transfers, and "exigent" market-dominant rate adjustments. Nor is it clear why the Section 3661 process and the resulting non-binding advisory opinions should demand extensive party-driven fact-finding, without a prior certification by the Commission that a given inquiry will actually further the Commission's evaluation of whether the Postal Service proposal is consistent with the policies of Title 39. Hence, the Postal Service proposes to eliminate party-driven discovery and harmonize fact-finding in Section 3661 proceedings with the Commission-led procedures in other proceedings.

## **2. Ex Ante Delineation of Scope**

If the Commission is determined to maintain party-driven discovery, the process should be streamlined by setting clearer boundaries for relevance. Currently, the Commission inaugurates each docketed Section 3661 proceeding with a Notice and Order that characterizes the Postal Service's initial submissions and invites party interventions and discovery.<sup>35</sup> Without any substantive guidelines from the Commission, interveners have sometimes

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<sup>35</sup> *E.g.*, Order No. 1027, Notice and Order Concerning Request for an Advisory Opinion Regarding the Revision of Service Standards for First-Class Mail, Periodicals, Package Services, and Standard Mail, PRC Docket No. N2012-1 (December 7, 2011).

exploited the broad standards of N-case discovery to lavish inquiries on the Postal Service into areas of parochial interest with only the trappings of relevance to the matter at hand.

For example, in all five of the most recent completed N-cases, various parties have taken advantage of the protracted discovery process and liberal discovery boundaries to submit a plethora of discovery requests on the Postal Service. Many of these requests have been for the purpose of developing alternative, competing, or conflicting service change proposals or plans, even though the Commission's role under Section 3661 is to advise the Postal Service on the likely effects of the *Postal Service's* own proposed service change and whether that change comports with the policies of Title 39.<sup>36</sup> Those statutory questions can be litigated without reference to such alternative proposals.

Although intervenors' alternative proposals in an N-case could arguably shed

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<sup>36</sup> For example, in PRC Docket No. N2011-1 (Retail Access Optimization Initiative), Public Representative witness Nigel Waters submitted testimony concerning an alternative optimization modeling approach to the one used by the Postal Service, which led to additional discovery and oral examination by the Postal Service and other parties. *E.g.*, Interrogatories USPS/PR-T1-1-16, PRC Docket No. N2011-1 (Oct. 3, 2011); Tr. at 1337-96, PRC Docket No. N2011-1 (Oct. 17, 2011). In the end, the Commission found Professor Waters's alternative approach to be problematic in several respects. Advisory Opinion on Retail Access Optimization Initiative, PRC Docket No. N2011-1 (Dec. 23, 2011), at 69-71. While the Commission did distill some suggestions for the Postal Service from Dr. Waters's submissions, *id.*, these likely could have been offered for the Commission's consideration through some means other than the time-consuming development of specific alternative proposals.

As another example, in PRC Docket No. N2010-1 (Six-Day to Five-Day Street Delivery and Related Service Changes), two intervenors propounded ample discovery about alternative proposals that they advanced in their eventual briefs. *See, e.g.*, Interrogatories DFC/USPS-T1-1, DFC/USPS-T2-2-3, DFC/USPS-T4-6, and DFC/USPS-T6-1, PRC Docket No. N2010-1 (Apr. 1, 2010); Interrogatories DFC/USPS-T1-3-11, and DFC/USPS-T4-13, PRC Docket No. N2010-1 (Apr. 20, 2010); Interrogatory DFC/USPS-T6-2, PRC Docket No. N2010-1 (Apr. 22, 2010). The Commission acknowledged these proposals, but did not allow them to distract from their proper focus on the Postal Service's proposal; the Commission did not rely on a single interrogatory by those intervenors as support in its advisory opinion. Advisory Opinion on Elimination of Saturday Delivery, PRC Docket No. N2010-1 (Mar. 24, 2011), at 138-39. In light of this perfunctory outcome, one wonders whether commensurate value resulted from the effort that all concerned invested in such extensive discovery on these subjects.

some comparative light on the Postal Service's own proposal, such tangential benefit is little worth the added costs of discovery, evaluation, cross-examination, and perhaps countering with testimony and argument.

Currently, the only check on non-relevant inquiries is the after-the-fact process whereby the Postal Service may object, the requester may move to compel a response, and the Presiding Officer or the Commission must weigh in on the objections' merit. Where this check is employed, it adds time and cost to the discovery process and, ultimately, to the overall procedural schedule. However, this approach also adds time and cost even where the check is not employed. A presumption of relevance, subject to objection, places the political onus on the Postal Service of adopting a defensive posture.<sup>37</sup> Hence, objections tend to be the rare exception rather than the rule, and the Postal Service expends time and resources in responding to inquiries the fruits of which may not contribute much, if at all, to the Commission's ultimate advice. Directly or indirectly, this see-if-someone-objects approach consumes much of the procedural schedule and delay that has figured in Section 3661 cases.

The Commission could help to keep discovery within productive channels by establishing clearly delineated relevant subject areas at the outset of the proceeding. In future Notices and Orders for Section 3661 cases, the Commission could include a section listing the discrete subjects that will be relevant to the scope of advice that the Commission intends to give. For

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<sup>37</sup> This onus weighs particularly heavily because all discovery in Commission practice plays out publicly and under the Commission's gaze, in contrast to civil discovery, which is *inter partes* except when a dispute arises that requires third-party resolution.

example, a Notice and Order in a hypothetical case could contain language along the following lines:

Participants are reminded that discovery<sup>38</sup> directed towards the Postal Service's direct case may begin upon intervention. Participants are encouraged to begin discovery as soon as possible because the Commission anticipates a limited discovery period in this proceeding. Participants shall direct discovery toward the following matters, which are directly relevant to the Commission's consideration of the Postal Service's direct case:

- The impact on quality of service experienced by postal customers, as explained in testimony filed by the Postal Service.
- [Any other specific implications for Title 39 policies that are raised by the Postal Service's direct case]

Participants may move for the Commission to expand the scope of relevant issues, upon good cause shown that such expansion will assist the Commission in determining whether the Postal Service's proposal is consistent with the policies of Title 39, United States Code.

Such subject-matter guidelines for discovery would improve the efficiency of Section 3661 proceedings, by shifting the burden onto proponents of discovery to explain affirmatively why their desired lines of questioning are tailored to Section 3661's task. This change would be even more effective if coupled with default numerical limits on discovery similar to those in the Federal Rules of Civil Procedure<sup>39</sup> and proportionality principles comparable to those that the federal courts employ.<sup>40</sup> However, this approach would not reap the same efficiency

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<sup>38</sup> This sample text is premised on the Commission's hypothetical decision to maintain party discovery. It would require modification, or could even be moot, if the Commission were to move to Commission-led information-gathering, as proposed in the previous section.

<sup>39</sup> See FED. R. CIV. P. 33(a)(1) (imposing limit of 25 interrogatories, including discrete subparts, subject to proponent's ability to seek court permission for additional interrogatories).

<sup>40</sup> See footnote 33 *supra*.

gains as would be achieved if the Commission itself were to conduct and control the information-gathering process, as recommended in the previous section.

### **3. Availability of Oral Hearings**

Currently, the evidentiary record in an N-case derives from months of party-driven discovery, which is elevated into written cross-examination through designation as such, followed by at least one round of hearings with oral cross-examination. The total number of days devoted to oral testimony in N-cases (initial phase, rebuttal, and surrebuttal) ranges from two days (PRC Docket No. N2006-1) to nine days (PRC Docket No. N2010-1). The average number of days devoted to oral hearings in an N-case is 4.4 days.<sup>41</sup> Oral hearings require participants to ensure that witnesses are available to appear in person at the Commission's headquarters in Washington, D.C., which frequently requires witnesses and other party representatives to travel and increases participants' costs. Oral hearings also require a substantial resource commitment on the Commission's part. Moreover, the need for parties' and witnesses' preparation for, participation in, and review of transcripts from oral hearings adds further time to the procedural schedule, thereby contributing to the overall length of an N-case proceeding. Abbreviating or eliminating oral hearings in N-cases would shorten the procedural schedule and reduce the participants' litigation burdens, thereby permitting those participants to focus their time and resources on other aspects of the proceeding. Streamlining and eliminating oral hearings could help

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<sup>41</sup> Field hearings are not included in these tallies due to their limited evidentiary status in past N-cases. If they were included, the total range would be from two days (PRC Docket No. N2006-1) to sixteen days (PRC Docket No. N2010-1), with an average of approximately six days. As noted in Section II.C below, the need for travel to and from field hearings adds additional time to the schedule.

the Commission to maintain a 90-day procedural schedule, as proposed in section II.A.1 above.

While 5 U.S.C. § 556(d) nominally entitles parties to conduct cross-examination, it does not necessitate both written and oral discovery in every proceeding. Section 3661(c) requires “an opportunity for hearing on the record under sections 556 and 557 of title 5”; those sections, in turn, require that parties be “entitled to present [their] case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.”<sup>42</sup> The latter provision does not entitle parties to a particular form of cross-examination, but rather entitles parties to present their case or defense “by oral or documentary evidence” (emphasis added). In fact, 5 U.S.C. § 556(d) specifically provides that “[i]n rule making ... an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.”<sup>43</sup> Therefore, it would be statutorily adequate in many N-cases to develop a record solely through the presentation of documentary evidence.

To the extent that the Commission continues to afford opportunities for oral cross-examination, the Commission can more rigorously police the extent to which the cross-examination truly aims at information “*required* for a full and true disclosure of the facts” essential to its advisory opinion, not merely at information of potential interest.<sup>44</sup> By rule, evidentiary hearings are for the purpose of

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<sup>42</sup> 5 U.S.C. § 556(d).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* (emphasis added).

following up on answers to written discovery and for testing assumptions, conclusions, or other opinion evidence.<sup>45</sup> In practice, however, few limits tend to be imposed on the range of questions posed to witnesses on oral cross-examination or on the follow-up to the cross-examination conducted by other participants. This policy may have served the Commission in its pre-PAEA incarnation, when this approach to hearings was accommodated within the ten-month limit for omnibus rate cases. But if N-cases are to be constrained into shorter time periods, this policy will need to yield. As with discovery, the Commission could take more active measures to ensure that oral cross-examination and follow-up rights are limited to developing the facts expressly instrumental to the Commission's eventual advice.

Tight control of cross-examination, particularly where a streamlined schedule is warranted, is consistent with Constitutional and APA requirements.

Although the right to confront adverse information may be basic to adequate procedures, however, the nature of the confrontation should vary according to decisionmaking demands. ... The law under both due process analysis and the APA ... provide the agency with broad discretion to deny or limit the right [to cross-examination]. As the First Circuit observed: "The APA affords a right only to such cross-examination as may be necessary for a full and fair adjudication of the facts."<sup>46</sup>

The new NRC procedures discussed in section II.A.2 above establish that cross-examination is no longer available as of right in streamlined proceedings.<sup>47</sup>

Although parties may request leave to conduct cross-examination, a hearing

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<sup>45</sup> 39 C.F.R. § 3001.30(e)(3).

<sup>46</sup> CHARLES H. KOCH, JR., 2 ADMIN. L. & PRAC. § 5:54 (3d ed. 2012) (quoting *Citizens Awareness Network v. United States*, 391 F.3d 338, 351 (1st Cir. 2004)).

<sup>47</sup> 10 C.F.R. § 2.1204.

officer is only required to grant such requests when it is “necessary to ensure the development of an adequate record for decision.”<sup>48</sup> The U.S. Court of Appeals for the First Circuit upheld these procedures under 5 U.S.C. §§ 556 and 557 because they continue to permit cross-examination when a party meets its burden of showing that cross-examination is “necessary for a full and fair adjudication.”<sup>49</sup> The court also held it was not “arbitrary and capricious for the [NRC] to leave the determination of whether cross-examination will further the truth-seeking process in a particular proceeding to the discretion of the individual hearing officer.”<sup>50</sup>

Indeed, the APA even accommodates presumptions against oral cross-examination in certain contexts subject to formal hearing requirements. For instance, in *Boston Carrier v. Interstate Commerce Commission*, the U.S. Court of Appeals for the D.C. Circuit upheld the Interstate Commerce Commission’s (ICC’s) use of a “modified procedure” whereby common carrier licensing decisions could be rendered solely on the basis of written submissions.<sup>51</sup> In so doing, the court stated the “the decision whether to grant an oral hearing is generally a matter for the [ICC’s] discretion. The [ICC] may deny a hearing even where material facts are disputed, so long as the disputes may be adequately resolved by the written record.”<sup>52</sup> The ICC’s regulations required requests for

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<sup>48</sup> *Id.*

<sup>49</sup> *Citizens Awareness Network*, 391 F.3d at 351-52.

<sup>50</sup> *Id.* at 354.

<sup>51</sup> See *Boston Carrier v. Interstate Commerce Comm’n*, 728 F.2d 1508, 1511 n.5 (D.C. Cir. 1984).

<sup>52</sup> *Id.* at 1511 n.5 (citations and internal quotation marks omitted); *accord*, e.g., *Lodi Truck Serv. v. United States*, 706 F.2d 898, 901 & n.5 (9th Cir. 1983) (noting that 5 U.S.C. § 556(d) “expressly

oral hearings to specifically state (1) what evidence would be presented, (2) why the evidence was material to the proceeding, and (3) why an oral hearing was needed to elicit that evidence.<sup>53</sup> Finding that the appellant failed to meet its burden for showing the need for the requested oral hearing, the court concluded that the ICC “reasonably could have found the factual disputes to be resolvable using their modified procedures.”<sup>54</sup>

By contrast, the Commission’s existing rules of practice do not capitalize on this discretion, but instead allow for oral cross-examination whenever “[a] hearing is requested by any party to the proceeding,” regardless of the actual utility of an oral hearing to the aim of an N-case.<sup>55</sup> As *Boston Carrier* further demonstrates, agencies have a great deal of discretion to structure adjudications without the trappings of a civil trial. The ICC example shows that the Commission has the authority to reach a suitable advisory opinion in many Section 3661 proceedings largely or entirely on the basis of written pleadings. Such procedures would be particularly helpful in resolving Section 3661 proceedings that involve relatively low-impact changes in nationwide service, that build on prior Commission proceedings, or that turn largely on the review of technical materials. In such instances, the Commission, the Postal Service, and

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authorizes the [ICC], when a party will not be prejudiced thereby, to ‘adopt procedures for the submission of all or part of the evidence in written form’”; see also *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 241 (1973) (“[T]he [APA] makes it plain that a specific statutory mandate that the proceedings take place on the record after hearing may be satisfied in some circumstances by evidentiary submission in written form only.”).

<sup>53</sup> *Boston Carrier*, 728 F.2d at 1511 n.5 (citing 49 C.F.R. § 1160.68(b) (1984)).

<sup>54</sup> *Id.*

<sup>55</sup> 39 C.F.R. § 3001.18(a).

the general public would especially benefit from an expeditious resolution of the proceeding.

Appearances by witnesses for oral testimony can lead to constructive exchanges, perhaps especially when Commissioners pose questions. Yet the Commission has proven eminently capable of issuing information requests at any stage of a proceeding; however, the value of party-conducted oral cross-examination has become quite modest. Hence, minimizing the use of evidentiary hearings and, when used, maximizing their efficiency, present another opportunity by which the Commission can shorten N-cases, and improve the predictability of an opinion's timing.<sup>56</sup>

### **C. Field Hearings**

Commission decisions to hold field hearings in N-cases present another example where discretionary Commission decisions giving voice to particular stakeholders have consumed extensive resources with only modest contributions to the advisory opinion itself. Field hearings cause substantial delay in the issuance of an advisory opinion. In the N-cases regarding the Station and Branch Optimization and Consolidation Initiative (PRC Docket No. N2009-1) and Five-Day Delivery (PRC Docket No. N2010-1), the Commission held field hearings in multiple locations: two days in the former docket and seven days in the latter. (Of course, the need to coordinate Commissioner and witness

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<sup>56</sup> See *Citizens Awareness Network*, 391 F.3d at 353 ("The new rules' outlook on cross-examination presents a closer question. The [NRC] reasons that restricting cross-examination will reduce the amount of testimony taken and make hearings more efficient. 69 Fed. Reg. [2,182,] 2,196 [(Jan. 14, 2004)]. The [NRC] further observes that, in its experience, cross-examination is not always helpful to the resolution of scientific or technical issues. *Id.*"). The Postal Regulatory Commission faces similar challenges.

schedules and travel to and from field hearings adds additional time to the procedural schedule.) Field hearings entail the same burdens and costs as oral hearings, but to an even greater extent, as Commissioners, Commission staff, D.C.-based Postal Service counsel and staff, and other D.C.-based party representatives must travel to multiple remote locations to attend public listening sessions with ultimately dubious evidentiary value.

As a general principle, public input from around the country can help to connect people with decisions made in Washington. In terms of their place in N-cases, however, the costs and benefits of field hearings should be evaluated in terms of their impact on an evidentiary record, not merely on their general civic value. Field hearings give voice to a few selected witnesses; they are not a forum for input reflective of the general public. In past N-cases, field hearings have produced speeches without opportunity for cross-examination or other party interrogation; since this does not meet the requisite standard for record evidence, it could have little or no valid impact upon the Commission's advisory opinion. At the same time, such speeches, even those by non-formal participants, often do little more than emphasize positions already represented by formal participants in the case and are therefore duplicative. The Commission should forgo field hearings because (1) they are unlikely to produce material evidence, (2) the information that they evoke could more easily and reliably be produced through alternative means (e.g., written discovery or oral hearings at Commission headquarters), and (3) the "testimony" is such that the Commission would be

legally barred from relying on it, due to the lack of cross-examination or other due process guarantees for N-case participants.

#### **D. Filing Periods for Notices of Intervention**

One factor that contributes to the length of N-case proceedings is the time afforded to participants to decide whether the investment of intervention is worthwhile. On average, participants have been afforded approximately 26 days to file a notice of intervention in a proceeding. Prehearing conferences are scheduled within a week of this filing deadline, at which time the participants have an opportunity to provide input into the procedural schedule. Hence, the period for notices of intervention can be seen as a waiting period pending more productive phases of the procedural schedule.

One justification for extending the intervention period for more than three weeks is to ensure that all potential participants can evaluate the merits of the subject matter and its potential significance before deciding whether to intervene. However, the Commission's current practice appears to be a carry-over from days of litigation on paper without acknowledgment that public access to information about the Commission and the Postal Service is today well-facilitated via the Internet, the Commission's website, and trade press websites. These media sources mitigate the need to provide stakeholders with more than a few days to intervene in an N-case proceeding, because parties can quickly learn when an expected N-case has been filed, with foreknowledge of what it entails, and at least some of the issues it raises; stakeholders therefore should have little difficulty in managing a quicker decision whether to intervene. (In any event, the

Commission also routinely grants late interventions.) In contrast to statutes governing other types of Commission proceedings,<sup>57</sup> Section 3661 does not require that notice of the proceeding be published in the *Federal Register* as opposed to other effective venues, nor is *Federal Register* notice required by the APA provisions to which N-cases are subject.<sup>58</sup>

While participants may initiate discovery during the lengthy intervention periods, little discovery or other activity (compared to the total amount undertaken) typically occurs during this period. This contributes to the tendency of participants to request a long period of time to conduct discovery on the Postal Service's direct case, thereby increasing the total length of an N-case proceeding and delaying issuance of the advisory opinion.

The Commission should strongly consider adopting measures that urge respective participants to focus early upon specific details that bear upon the Commission's interest or that pertain to a participant's unique concerns. The intervention period thus presents substantial opportunity for foreshortening proceedings, particularly if the Commission recognizes that parties receive

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<sup>57</sup> *E.g.*, 39 U.S.C. §§ 3632(b)(2), 3641(c)(1), 3642(d)(1)-(2).

<sup>58</sup> Sections 556 and 557 of Title 5, U.S. Code, do not contain provisions on the manner of notice. By contrast, 5 U.S.C § 553(b), which applies to Commission rulemakings but which Congress did not apply to Section 3661 proceedings, requires either actual notice or publication in the *Federal Register*. Indeed, in another context not subject to 5 U.S.C. § 553, the Commission recently recognized that participants in Post Office closing appeals – who are often less experienced in Commission practice than the members of the postal bar generally involved in N-cases – receive effective notice through alternative means, hence the Commission determined that publication of notice for such appeals in the *Federal Register* was unnecessary in the absence of any statutory or Constitutional prohibition. Order No. 1171, Order Adopting Final Rules Regarding Appeals of Postal Service Determinations to Close or Consolidate Post Offices, PRC Docket No. RM2011-13 (Jan. 25, 2012), at 1-2; Order No. 823, Supplemental Notice Regarding Proposed Rules Governing Appeals, PRC Docket No. RM2011-13 (Aug. 25, 2011), at 1-3.

effective notice through means other than *Federal Register* publication.

### **III. Conclusion**

With Order No. 1309, the Commission is taking a fresh look at whether the marginal benefits of extended trial-type procedural tools are worth the costs of delay in current N-case advisory opinions, and extensive consumption of scarce, expert resources, when history demonstrates the Postal Service's increasing need for timely expert advice. This is an important project as the Postal Service faces increasing pressure to make operational changes that require advisory opinions under Section 3661. The Postal Service respectfully submits the comments above for the Commission's consideration.

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